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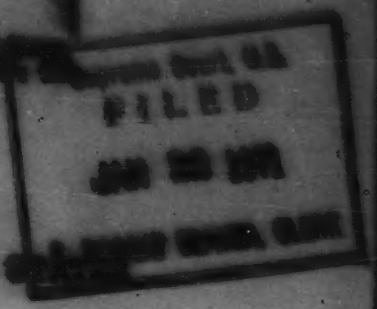

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1264

HAROLD DAVID GIBBS, Petitioner
v.
UNITED STATES OF AMERICA, Appellee

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OPINION BELOW

Petitioner, Harold David Gibbs, Jr., hereby applies for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment rendered by said court in the above entitled cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals in the instant matter was entered November 19, 1970. A petition for rehearing was thereafter filed by petitioner, and the same was denied by the order of the Court of Appeals filed December 23, 1970. A copy of said order is appended hereto and designated as Appendix "B" to this petition. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1).

REASON FOR HEARING

A hearing is requested in the instant matter to render the judgment herein consonant with this Court's determination in Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L.Ed.2d 57 (1969), respecting the evidentiary requisites in a prosecution for violation of 21 U.S.C. 176a. In the case at bar, it is submitted, the very presumption ruled unconstitutional in Leary was tacitly employed in lieu of substantive evidence of record to prove two essential elements of the prosecution: that the marijuana subject of the charges

in the case was imported and that the importation was unlawful. Such result cannot be sanctioned without negativing the purport of the Leary decision and depriving it of the clear and unequivocal authoritative effect which is essential to a determination of this Court. A hearing herein is thus needed to reaffirm and apply the holding of Leary to the case at bar and to reverse the judgment below which is in conflict therewith.

STATEMENT OF CASE

The present case concerns a prosecution for knowingly receiving, concealing and facilitating the transportation and concealment of marijuana in violation of 21 U.S.C. 176a and for conspiracy to violate said section. Petitioner was tried jointly with Jose Felipe Fernandez-Ortiz, also known as Joe Fernandez, and Elvira Galvan Rodriguez before a jury on the said charges. A judgment of acquittal as to Rodriguez was ordered entered by the trial court, and the jury returned verdicts of guilty against petitioner and Fernandez-Ortiz on both counts of the

indictment. Petitioner was sentenced to a term of imprisonment for five years concurrently as to each count and has remained at liberty on appeal bond pending determination of his appeal.

STATEMENT OF FACTS

Two evidentiary hearings were had in the case at bar. The first, transpiring October 8, 1969, pertained to a motion to suppress evidence made by the parties and was heard before the trial court alone in the absence of the jury. The second evidentiary proceeding was the trial of the cause before the jury on October 14, 1969 in which the substantive evidence in support of the verdicts thereafter returned was adduced. The basis for the within petition contests the sufficiency of the substantive record to prove the essential allegations of the charged offenses, and accordingly only the evidence presented to and heard by the jury will be detailed below. All page references are thus to the reporter's transcript of the trial proceedings of October 14, 1969.

The trial evidence in the instant matter consisted of the testimony of four United States Customs Agents plus an initial stipulation that the material recovered from the Buick automobile driven by petitioner at the time of his arrest was analyzed and found to consist of seventy-five packages of marijuana weighing approximately one hundred five pounds (R.T. pp. 22-24).

Rex Holgerson was called first as a witness. He identified himself as a United States Customs Agent and testified that shortly after 8:00 p.m. April 29, 1969, he went to the Safeway parking lot in Nogales, Arizona located about a half block from the border crossing point between the United States and Mexico. In the lot, in a darkened area, he observed two vehicles parked near each other, a green Buick sedan with Sonora, Mexico license SJ 4895 and a white Ford pick-up with Sonora, Mexico license SH 8931. He walked close to the vehicles and noticed a strong marijuana odor in the area. He then left the location and took a vantage

point to continue observation. About 8:30 p.m. he saw petitioner, Fernandez-Ortiz, and Rodriguez walk onto the lot and approach the rear of the two vehicles, petitioner walk around and to the side of the Buick, and then the three of them leave the lot together. As they left the area petitioner carried a small object in his hand but appeared to be carrying nothing before approaching the vehicles (R.T. pp. 24-29).

Holgerson followed the three individuals and observed them sitting for a time on the steps of a building about a block from the Safeway store, and then saw them go to the bus station across the street from the port of entry. Holgerson then contacted other agents at the port of entry and directed them to maintain surveillance on the parties. He returned to the Safeway parking lot and met agent Cavitt there. Shortly afterward he saw petitioner and Fernandez-Ortiz walk onto the parking lot, remain a brief time, and then leave. Following this he crawled under the Buick and observed a special

metal compartment attached to the undercarriage of the vehicle. Through cracks in the compartment he saw numerous green paper wrapped packages and also detected a strong odor of marijuana. He received a signal from Cavitt at this time, removed himself from beneath the Buick, and secured a hiding place. He then saw Fernandez-Ortiz walk to the Ford pick-up, enter it, and drive from the lot across the border into Mexico and out of view (R.T. pp. 29-31).

Approximately 9:45 p.m. Holgerson again saw petitioner and Fernandez-Ortiz enter the parking lot. Petitioner went to the Buick, got into it and started the engine, and then turned the car around. He then got out of the vehicle and proceeded to remove the license plates on the car and to replace them with others. Fernandez-Ortiz then walked to the Buick, appeared to talk briefly with petitioner, and walked away. Petitioner re-entered the car and drove it from the location. Holgerson followed him, was joined by agent Klink, and the two of them stopped and

arrested petitioner. The Buick was searched and the packages recovered and removed from the under compartment. These items were then booked as evidence and received in the trial of the case (R.T. pp. 32-38).

Roland Klink then testified that he was a Customs Agent for the Treasury Department and that about 8:20 p.m., April 29, 1969, he received a request for assistance from Agent Holgerson. Following this he commenced surveillance of petitioner and Fernandez-Ortiz, observing them initially in front of the bus station. He saw them talking together, enter and leave the bus depot several times, and then walk towards the Safeway shopping area out of his view. Petitioner returned to his view shortly afterward and was observed by Klink to walk about in the area near the bus station, looking about from time to time, stand for a while in front of a closed cleaning store, then enter a drug store but not appear to make a purchase, and then walk back to the bus station. About 10:00 p.m., from another

vantage point, Klink saw Holgerson in his car in pursuit of a green Buick. He immediately followed in his own car and assisted in the stopping and arrest of petitioner, who was driving the Buick, and in the search of that vehicle and recovery of the evidence (R.T. pp. 50-56).

John Dennis then testified that he was also a special Customs Agent and that in the company of Agent Cavitt he placed Fernandez-Ortiz and Rodriguez under arrest as they were entering a taxi cab near the bus station in Nogales. Prior to that he had participated in the surveillance of the parties. Just before the arrest he observed Fernandez-Ortiz come from the Safeway parking lot and Rodriguez from the bus station. He received a radio call from Agent Holgerson at that time (about 10:00 p.m.) and then made the arrests (R.T. pp. 65-72).

Horace Cavitt then testified that he was a Customs Agent stationed at Nogales, Arizona. He received a call for assistance from Agent Holgerson following which he

proceeded to the Safeway parking lot where he examined a green Buick and white Ford pick-up, both with Sonora, Mexico license plates, which were parked there. He noticed nothing unusual about the Ford but observed a special compartment containing wrapped brick shaped packages under the Buick and a strong odor of marijuana from the location. He then communicated this information to Holgerson and observed him look under the Buick. Subsequently he observed the Buick being driven from the area. He then joined Agent Dennis, and after receipt of a call from Holgerson assisted Dennis in the arrest of Fernandez-Ortiz and Rodriguez. Later he again observed the Buick and at that time it had California license plates on it (R.T. pp. 73-78).

The foregoing concluded the substantive evidence of record presented to the jury and thus formed the basis for the verdicts returned against petitioner.

PETITIONER'S POSITION

Petitioner contends that the evidence received in the trial of the instant case is insufficient as a matter of law, under the holding of this Court in Leary v. United States, supra, to establish two requisite elements of the charges against him, to wit: that the marijuana found in his possession was of foreign origin and that such marijuana was unlawfully imported. Petitioner submits that such elements must be established by competent evidence and not assumption, and that the lack of evidence in this respect reflects a deficiency in the trial record which warrants, consistent with the Leary decision, a reversal of the consequent judgment of conviction herein.

DISCUSSION OF CASE

A discussion of the present matter requires an initial analysis of the decision in Leary v. United States, supra, which concerned the requisites of proof in prosecutions under 21 U.S.C. 176a. It is, of course, clear that in such

prosecutions, as in the instant case, the charges concern acts purportedly committed respecting marijuana which has been unlawfully imported into the United States. Prior to the Leary case, the elements of unlawful importation were provable by application of a presumption contained in the charging code section based on the established fact of the defendant's possession of the marijuana subject of the case.

Leary, however, ruled this presumption to be unconstitutional and held that proof was required of each element of the accusation under §176a, including the unlawfully imported character of the marijuana in question. This, therefore, meant that the Government, to sustain its prosecution under §176a, had to present evidence respecting both the foreign origin of the subject marijuana and its unlawful importation. The present record, however, is devoid of any substantial evidence respecting either of these issues.

The two facets of the charge under 21 U.S.C. 176a, foreign origin and unlawful importation, although related, are essentially distinct and severable and thus must be regarded separately. The first circumstance concerns the derivation of the marijuana involved in the case; the second, the nature of its importation, whether lawful or contrary to law, if not of domestic character. Respecting the first matter, the origin of the subject marijuana, the substantive evidence in the case at bar is exceedingly limited.

Thus the sole evidence on this issue appears to be the proximity of the marijuana when first detected in the Safeway store parking lot to the international border and its concealment in a car of American manufacture containing Mexican license plates which were later replaced with California plates. No testimony, it appears, was offered in the case directly pertaining to the source of the marijuana or its transfer across the border; nor was any evidence adduced concerning the

character of the substance or its packaging which would have tended to establish a foreign origin. Moreover, there was no expert testimony presented relative to any distinctive characteristics between domestic and foreign marijuana from which the jury in the instant case could have assessed the exhibit before it with respect to its origin or source.

It appears that even the Court of Appeals in its decision below, in commenting on what it considered the circumstantial evidence in the record from which the jury could have found unlawful marijuana importation, could not avoid going beyond the record to base such support. Thus, the Court of Appeals commenced its itemization of the supportive evidence with reference to testimony of Agent Holgerson (that he believed his informer's telephone call originated in Mexico), which testimony was not presented to the jury at all but which was given solely in the pre-trial hearing on the motion to suppress evidence. Further, the Court of Appeals incorrectly stated

in its opinion on this point that the jury was given evidence that Fernandez-Ortiz drove the pick-up truck, that was parked next to the Buick automobile ultimately discovered to contain the subject marijuana received in the case, back into Mexico, whereas there was actually no evidence presented as to the truck having recently been in Mexico, except as may have been inferable from the call of Holgerson's informant which, as noted, was not evidence presented to the jury.

In effect, then, the Court of Appeals could not limit its references to evidence supportive of the jury's verdict herein to the substantive record of the case but relied on evidentiary support which was not presented to or considered by the jury. Additionally, it appears the Court of Appeals misinterpreted certain other facts testified to before the jury in this connection which requires comment. Thus, in its opinion the statement is made that petitioner commenced to drive the marijuana-laden vehicle northward as evidence that the marijuana contained in

the vehicle originated in Mexico. However, the actual testimony on this point by Holgerson was that the vehicle was driven by petitioner from the Safeway store parking lot to Crawford Street, then "east one block on Crawford, north again on Terrace Street and east on Elm and north on Arroyo Boulevard" where it was stopped after about two blocks (R.T. pp. 32-33). Such a route, it is submitted, is not evidence that the marijuana in the automobile so driven was of foreign origin and reliance on it reflects the very tenuous basis of the evidence of record in this regard.

Reduced to its essence, the substantive evidence concerning the source of the marijuana in the instant case was its initial location near the border in a car which for a time had Mexican license plates. This, it is submitted, is not evidence of origin of the marijuana but the basis only of surmise. To sustain a finding of imported character based thereon would be to substitute for the presumption invalidated by this Court in Leary another equally untenable presumption

predicated on proof of marijuana possession close to an international border. It is not, however, the particular location in the United States of the product when discovered which determines its source but evidence which relates to and thus establishes its non-domestic nature. Absent evidence of circumstances directly placing the subject marijuana outside the United States or being transferred across the border into the country, such evidence must be of a character which delineates origin by the quality of the material in question or by the manner of its packaging or by other certain indicia of international derivation.

As observed earlier, no evidence in any such or comparable respect was introduced in the case. The proof required of the Government in this connection was not presented to the jury, and the Government may not avoid its responsibility merely by showing the possession of marijuana proximate to the border as was done in the instant case. Rather the Government must be prepared, by direct or

circumstantial evidence, through perceived circumstances or expert testimony, to prove the foreign source of marijuana subject of prosecution under 21 U.S.C. 176a. Such is the obligation imposed by Leary v. United States, supra, and its non-satisfaction in the case at bar is evident from a review of a record which even the Court of Appeals could not limit itself to in endeavoring to uphold the verdicts returned.

The second facet of the charges in the present case warranting consideration, as referred to previously, concerns the unlawfulness of such marijuana importation as may have herein occurred. Respecting this issue, an evidentiary deficit is similarly apparent in the record. Thus, it should be observed, marijuana importation into the United States is not, as is the case of narcotic drugs under 21 U.S.C. 173, per se unlawful. Rather, marijuana importation is contrary to law only where the marijuana has not been declared and where requisite registration and tax payment has been fraudulently avoided. Thus,

as succinctly stated in Ortiz v. United States, 329 F.2d 381 (5th Cir. 1964) at page 382: " . . . the importation of marijuana is illegal except after payment under 26 U.S.C.A. 4751 of the special tax there required, and after registration under the provisions of 26 U.S.C.A. 4753 . . . ." (See, too, Instructions to Jury (R.T. pp. 109-110).

In the present case, it appears, the record is devoid of any proof that the subject marijuana, if imported, was imported unlawfully. The record, in essence, is completely silent on the question of tax payment and registration or the lack thereof. No presumption in this regard is available to the Government, but rather the Government must be prepared to prove and actually must present credible evidence on the issue. The lack of such evidence in the instant case thus fails to establish this essential element of the charges against appellant and constitutes a further critical defect in the Government's case. The unlawfulness of the importation, no less so than

each other element of the charges, requires proof by the prosecution, and such proof simply was not presented in the trial of the cause.

CONCLUSION

In Leary this Court declared that proof not presumption was requisite to the sustaining of charges under 21 U.S.C. 176a. However, in the instant case the mandate of this Court was essentially ignored. To permit the judgment herein rendered to stand will serve significantly to reduce the authority of Leary because it will sanction the use of a substituted presumption in lieu of the evidentiary proof directed by the express language of the Leary case. The consequent emasculation of the legal purport and effect of a decision of this Court by the Court of Appeals must not be affirmed. Limitation of Leary, if appropriate, should only stem from further consideration and determination of the issues by this Court. The decision of the Court of Appeals below is accordingly in conflict with established precedent of this Court, and a hearing

herein is thus required to remedy such circumstance.

APPLICATION

It is respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within petition for writ of certiorari be granted and the matter set for hearing on this Honorable Court's docket.

Respectfully submitted,
HOWARD E. BECKLER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. HAROLD DAVID GIBBS, JR., *Appellant.*	No. 25,271
UNITED STATES OF AMERICA, *Appellee,* v. JOSE FELIPE FERNANDEZ-ORTIZ, *Appellant.*	No. 25,286

[November 19, 1970]

Appeal from the United States District Court
for the District of Arizona

Before: MADDEN*, Judge of the United States Court of Claims, HAMLEY and TRASK, Circuit Judges.

TRASK, Circuit Judge:

Appellants were jointly tried before a jury and convicted on two counts of knowingly receiving, concealing and facilitating the transportation and concealment of marihuana in violation of 21 U.S.C. § 176a and of conspiracy to violate 21 U.S.C. § 176a. Both appellants were sentenced to five years imprisonment on each count, to be served concurrently. They have prosecuted separate appeals which we have consolidated for argument and disposition.

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*Hon. J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.

The pertinent facts are as follows: At approximately 8:00 P.M. on April 20, 1989, Special Agent Rex Holgerson of the United States Customs Service in Nogales, Arizona, received a telephone call from a known informer whom he believed to be in Mexico. The caller, speaking Spanish, informed him that a green 1955 Buick sedan and a white Ford pickup truck, both with Mexican license plates, were then parked in a supermarket parking lot in Nogales, one-third block from the Mexican border. The Buick contained a load of marihuana and, later that evening, persons unknown to the informer would pick up the Buick and drive it north from Nogales. The informer added that the pickup was also involved in the operation.

Agent Holgerson proceeded immediately to the parking lot and discovered the two vehicles there. The details given by the caller were accurate in every respect. Holgerson detected a strong odor of marihuana emanating from the area of the vehicles. About one-half hour later, Holgerson observed three people—later identified as the two defendants and one Elvira Galvan Rodriguez[1]—approach the vehicles together. Gibbs carefully walked around the Buick while the others remained at the rear of the cars. The three then left the parking lot. Soon thereafter, Gibbs and Fernandez-Ortiz returned to the lot but again walked away.

Agent Horace Cavill, whom Holgerson had summoned, approached the Buick and, looking underneath it, discovered a specially-built iron compartment welded to the frame of the car. The compartment contained a large number of green packages. The odor of marihuana was very strong underneath the car. Agent Holgerson then peered underneath the car and confirmed the observation.

As Holgerson completed the examination, about 9:00 P.M., Fernandez-Ortiz reappeared and drove the Ford pickup out of the parking lot and into Mexico. At approximately 9:30 P.M., Gibbs and Fernandez-Ortiz entered the lot. Gibbs replaced the Mexican license plates on the Buick with California plates as Fernandez-Ortiz looked up and down the street. About fifteen minutes later,

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[1]Miss Rodriguez was indicted and tried jointly with the appellants. The trial judge granted her motion for a judgment of acquittal at the close of the prosecution's case.

Gibbs took the Buick out of the parking lot and drove it several blocks northward until he was apprehended by Holgerson. A search of the compartment underneath the car's frame revealed one-hundred five pounds of marihuana. At the same time, another agent apprehended Fernandez-Ortiz as he prepared to enter a taxicab.

Appellants argue that the agents' search of the underside of the car while it was parked in the lot violated their Fourth Amendment right to be free of unreasonable searches. They further contend that the trial court erred in refusing to order the disclosure of the identity of the informer. Appellant Gibbs also asserts that the government failed to introduce any evidence that the marihuana had been imported into the United States contrary to law. We affirm.

(1) *Validity of the search*

Appellants allege that the agents' inspection of the underside of the Buick sedan constituted an unlawful, warrantless search and the evidence obtained as a result of that search—the marihuana—was inadmissible at trial. Appellants contend that, even though the evidence was located in an area which might be termed accessible to the public, they sought to preserve it as private and it is therefore constitutionally protected. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

Assuming *arguendo* that the agents' visual inspection constituted a search and that both appellants have standing to object to that search, the Fourth Amendment does not prohibit the warrantless search of a vehicle if it is made upon probable cause. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). We think that the agent had probable cause to inspect the vehicle. He had received a detailed tip from a known informer to the effect that the automobile contained marihuana. The tip proved correct in every other detail. Moreover, there was a strong odor of marihuana around the automobile.

The Supreme Court has held that, assuming the existence of probable cause, vehicles may be searched under circumstances which would not justify a warrantless search of a house, office or other immovable structure. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968). The reason for this distinction is that vehicles can be quickly moved out of the jurisdiction in which the warrant must

be sought. *Chimel v. California*, 395 U.S. 752, 764 n.9 (1969); *Carroll, supra*, 267 U.S. at 153. Here, despite the fact that the automobile was unoccupied at the time of the search, the agents had reasonable cause to believe that it would soon be moved outside the jurisdiction. The informer—reliable in all particulars to this point—had reported at 8:00 P.M. that the automobile would be driven north that evening. Moreover, two persons—later identified as the appellants—had twice approached and carefully examined the vehicle.[3]

We hold that, under the facts of this case, the agents' visual inspection of the vehicle was not an unreasonable search.

(2) *Refusal to disclose informer's identity*

Appellants, at the hearing on their motion to suppress evidence and again at trial, requested the court to order the government to reveal the name of the informer who telephoned Agent Holgerson. Appellants now allege that the court erred in denying these requests.

There is no absolute rule entitling a defendant to disclosure of the name of an informer who has furnished information used against him. The court must weigh the interest of the defendant's right to prepare a defense against the public policy of conserving the usefulness of an informer and protecting him personally. The Supreme Court said in *Roviaro v. United States*, 353 U.S. 53, 62 (1957):

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

See also *McCray v. Illinois*, 386 U.S. 300 (1967); *Ybarra v. United States*, No. 25, 289 (9th Cir. Aug. 24, 1970).

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[3] The mobility of the object to be searched without a warrant distinguishes this case from *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968), cited by appellants. The likelihood that the vehicle would be quickly moved outside the jurisdiction distinguishes the case from *United States v. Payne*, 429 F.2d 169 (9th Cir. 1970).

Appellants argue, and this court has acknowledged, that disclosure is required where it would be "relevant and helpful" to the defense because the informer was a participant in or a witness to the crime charged. *Roviaro, supra*, 353 U.S. at 60; *Lopez-Hernandez v. United States*, 394 F.2d 820, 821 (9th Cir. 1968). In this case, however, there is no evidence that the informer in any way participated in the venture or witnessed any part of it.[3]

Under the circumstances of this case, we consider the public's interest in the protection of informers overrides the appellants' interest in identification. We do not think that knowledge of the informer's identity would have been of material benefit to appellants' defense. We hold that the district court did not err in refusing to disclose the identity of the informer.

(3) *Evidence of importation contrary to law*

Appellant Gibbs asserts that the government failed to introduce any evidence that the marihuana was imported or brought into the United States contrary to law, as required under 21 U.S.C. § 176a. We think that there was considerable circumstantial evidence from which the jury could find beyond a reasonable doubt that the marihuana was imported contrary to law. Evidence of importation included the following: Agent Holgerson testified that he believed that the informer's telephone call originated in Mexico; both vehicles displayed Mexican license plates; approximately one-half hour before Gibbs and Fernandez-Ortiz changed the license plates, Fernandez-Oritz drove the pickup back into Mexico; the vehicles were parked one-third block from the Mexican border, and Gibbs began to drive the marihuana-laden Buick northward. The clandestine switch of license plates and overall secretive conduct of both appellants was evidence that the operation was being conducted contrary to law.

The judgments are affirmed.

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[3]The factual circumstances of this case more closely approach those in *Encinas-Sierras v. United States*, 401 F.2d 228 (9th Cir. 1968); *Bloomer v. United States*, 409 F.2d 869, 871 (9th Cir. 1969), and *United States v. Camacho*, 423 F.2d 707 (9th Cir. 1970).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

HAROLD DAVID GIBBS, JR.,

Appellant.

FILED
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WM.B.LUCK, CLERK

No. 25,271

O R D E R

Before: MADDEN*, Judge of the United States Court of Claims, HAMLEY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

* Hon. J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1264

HAROLD DAVID GIBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner and one Fernandez-Ortiz were convicted on two counts of knowingly receiving, concealing and facilitating the transportation and concealment of approximately 105 pounds of illegally imported marihuana, in violation of 21 U.S.C. 176a, and of conspiracy to violate that statute (Tr. 11–12, 122).[1] Each was sentenced to concurrent prison terms of five years. The court of appeals affirmed (Pet. App. A).

[1] "Tr." refers to the trial transcript, a copy of which we are lodging with the Clerk of this Court.

416-649—71

The evidence at trial[2] disclosed that on April 29, 1969, shortly after 8:00 p.m., customs agent Holgerson received a tip from an informer concerning a planned narcotics transaction in Nogales, Arizona. On the basis of that tip, he went to a supermarket parking lot located about a third of a block from the international border. As he had been advised, he found there a 1955 Buick and a Ford pickup truck parked together, both of which had Mexican license plates. A strong odor of marihuana was detected in the immediate area. (Tr. 25–27.)

At about 8:30 p.m., Holgerson observed petitioner, Fernandez-Ortiz and another person approach the two vehicles. Petitioner walked around the Buick and the other two remained at the rear of the vehicles. The three then left the parking lot and went to a location about a block away where they appeared to confer. Shortly thereafter petitioner and Fernandez-Ortiz returned to the parking lot but again walked away. (Tr. 28–31.)

After they left another customs agent (Cavitt) discovered under the Buick a special metal compartment welded to the frame and containing green packages. The odor of marihuana was very strong under the car. Holgerson confirmed these observations. (Tr. 31, 39, 74.) At about 9:00 p.m., Fernandez-Ortiz reappeared and drove the Ford pickup out of the parking lot and across the border into Mexico (Tr. 31, 75–

[2] Petitioner has abandoned contentions raised below as to the denial of his motion to suppress evidence of the marihuana. Accordingly, only the trial testimony will be referred to here.

76). At approximately 9:45 p.m., petitioner and Fernandez-Ortiz re-entered the parking lot. Petitioner removed the Mexican license plates from the Buick and replaced them with California plates, while Fernandez-Ortiz looked up and down the street (Tr. 32, 77–78). At about 10:00 p.m., petitioner drove the Buick out of the parking lot. After making several turns, he headed northward away from the Mexican border. He was stopped and arrested by the agents, who had followed him (Tr. 32–33, 54–55). A search of the compartment underneath the Buick resulted in the seizure of 75 packages of marihuana weighing approximately 105 pounds (Tr. 22–24, 34).

Petitioner challenges the sufficiency of the evidence to show that the marihuana seized was of foreign origin and was unlawfully imported. The district court refrained from relying on the presumption from possession under 21 U.S.C. 176a, but instead charged the jury that it had to find that the marihuana had been illegally imported and that the defendants knew that fact (Tr. 111–112, 116); petitioner asserts that because the evidence on these points was so scanty, the presumption "was tacitly employed" (Pet. 2), and that its "tacit" use contravenes the principles enunciated in *Leary* v. *United States*, 395 U.S. 6."[3]

[3] Petitioner does not suggest that he had no knowledge that the marihuana was illegally imported—the precise issue as to which *Leary* invalidated the presumption under 21 U.S.C. 176a. As the court below concluded (Pet. App. A5), the activities of the defendants support the jury's inference of actual knowledge.

This argument is without merit. As noted by the court below (Pet. App. A5), the government's case on these issues was grounded on circumstantial evidence from which the jury could properly infer unlawful importation.[4] And while foreign origin is not an essential element of the offense,[5] yet this fact too was inferable from the circumstances: automobiles with Mexican license plates, the proximity of the border, and Fernandez-Ortiz driving the truck into Mexico.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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[4] Indeed, the inference from mere possession of marihuana that it was unlawfully imported—which is not the issue here, since the government was required to prove this element—was a question expressly left open by *Leary*. In a careful analysis, the Ninth Circuit has concluded that that inference is permissible under the *Leary* rationale. *United States* v. *Avey*, 428 F. 2d 1159, 1161–1164.

[5] It is immaterial whether the marihuana was originally grown in the United States or somewhere else; 21 U.S.C. 176a speaks only of bringing marihuana *into* the United States contrary to law, without regard to its origin. See the government's Brief in Opposition in *Houle* v. *United States*, No. 5576, this Term, certiorari denied, October 26, 1970.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1264

IVERNE R. CARTER, Warden, et al.,
PETITIONERS,

v.

LUCILLE MILLER,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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LUCILLE MILLER,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals and the United States District Court for the Central District of California are appended to the Petition. The per curiam dismissal by this Honorable Court of Respondent's Writ of Certiorari as having been improvidently granted is appended hereto as Appendix A.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

I. Did Respondent deliberately by-pass state procedures by her institution of federal Habeas Corpus proceedings, where the state court had actually passed on the merits of her claim?

II. Did this Honorable Court, in dismissing, per curiam, Respondent's Writ of Certiorari as improvidently granted, adjudicate the merits of her constitutional claim so as to bar her from subsequent federal Habeas Corpus relief?

III. Did Respondent waive her constitutional objection to illegally obtained testimonial evidence when her counsel did specifically object, on federal constitutional grounds, to the introduction of said evidence and specifically objected to the trial judge's ruling that the objection must be renewed in the presence of the jury?

Constitution and Statutory Provisions Involved

This case involves 28 U.S.C. § 2244(c), reflected on Page 3 of the Petition as well as S. Rep. No. 1797, 1966 U.S. Code Cong. & Adm. News 3664.

Statement of the Case

Respondent was convicted of first degree murder in the Superior Court of San Bernardino County, California, and sentenced to life imprisonment. Her conviction was affirmed by the California District Court of Appeal, *People* v. *Miller*, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966). The Supreme Court of the United States initially granted certiorari, *Miller* v. *California*, 389 U.S. 968 (1967), but after hearing oral argument ordered the writ dismissed as improvidently granted, *Miller* v. *California*, 392 U.S. 616 (1968).

Respondent then commenced this federal habeas corpus proceeding, contending, as she had in her petition for certiorari to the Supreme Court of the United States, that her constitutional rights were infringed by the government's use of the testimony of an undercover agent placed in her jail cell after her arrest. The district court dismissed the petition, holding that Respondent had deliberately by-passed state procedures, and, in any event, that the Supreme Court of the United States had adjudicated the merits of Respondent's constitutional claim against her.

By decision dated October 9, 1970 the United States Court of Appeals for the Ninth Circuit reversed and remanded the case for further proceedings finding that Respondent had not deliberately by-passed state procedures in applying for federal habeas corpus relief, that she had not waived her constitutional claim and that this Honorable Court, in dismissing the writ of certiorari as improvidently granted did not adjudicate the merits of her constitutional claim.

On December 18, 1970 said court of appeals denied Petitioner's motion for a re-hearing en banc.

Statement of Facts Pertinent to the Questions Presented

At 1:50 p.m. on October 9, 1964, three deputy sheriffs entered Mrs. Miller's home and placed her under arrest for murder. (R. 60, 1017) She was taken to the San Bernardino County jail where she was met by her attorney and "booked" for murder. (R. 1018) At 9:00 a.m. she was taken from her cell and questioned for several hours.

At about 11:00 p.m. on October 9, Peggy Fisk, an undercover agent in the employ of the Sheriff's office, was falsely "booked" on a narcotics violation and placed in Respondent's cell. (R. 1103) Shortly thereafter, the two other prisoners who had been sharing the cell with Re-

spondent were removed so that Miss Fisk could be alone with Respondent in the cell. (R. 1197-98) Miss Fisk remained alone in the cell with Respondent for 7 days, until October 15. During that entire period, Respondent had a number of retained lawyers who remained on duty outside her cell 24 hours a day in order to assure that the authorities would respect her privilege against self-incrimination. (R. 2319) Respondent, of course, did not have counsel inside the cell. Nor did she think she needed one there, for Miss Fisk never told Respondent that she was a police agent rather than a real prisoner, or that she had a right to remain silent and have an attorney present at all their "discussions". On October 13, during the period that Miss Fisk was in the cell, Respondent was brought before Superior Court Judge John Kerrigan and formally charged with first degree murder. Miss Fisk remained in the cell and continued to obtain incriminating information even after Respondent had been formally charged. The judge issued an order prohibiting officials from questioning Respondent unless her attorney was present. He also ordered Respondent's attorneys to stop sitting outside the cell. The prosecutor violated the order by keeping Miss Fisk in the cell with Respondent until October 15.

Peggy Fisk was called as a government witness. Respondent's counsel objected to permitting Miss Fisk to testify, on the ground, among others, that such testimony would violate "the rule in *Messiah* [sic] *versus the United States.*" Peggy Fisk testified that Respondent had admitted to her that "she did not love her husband;" that "she always loved Mr. Hayton and still did"; and that she was planning to go to Europe with the $100,000 insurance. (R. 1199-01) The prosecutor relied heavily on Miss Fisk's testimony during the course of the trial and in his closing remarks to the jury. (R. 1258-59, 2012, 2061-62, 2318-20)

The jury deliberated for more than three days before they returned a verdict of guilty of murder in the first degree. (R. 2370, 2401) The prosecutor then announced his intention to waive a jury determination of the penalty and not to ask for the death sentence; the judge sentenced Respondent to life imprisonment. (R. 2407-20)

When Peggy Fisk, the sheriff's undercover agent, was called to the stand as a witness for the prosecution, Respondent's counsel, Mr. Foley, objected to "any evidence from this witness at this particular time." The ground stated in support of the objection at that time was non-federal. (R. 1007) At the suggestion of the court, proceedings were then continued outside the hearing of the jury in the Judge's Chambers. The proceedings remained on the record and the following persons were present: The Judge; the Deputy District Attorney; the defense attorney; the defendant; and the Court Reporter. (R. 1008) At this time the defense attorney added the following federal objection: "I am going to represent to the court also that any testimony of the witness concerning any statement made by my client would be in violation of the rule in the *Dorado* case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of [her] right to remain silent. So any testimony of this witness concerning statements made by my client not only violates the rule in the *Dorado* case, but . . . also the rule in *Messiah* [sic] *versus the United States*." (R. 1009) The deputy district attorney replied at length to defense counsel's objection. He admitted that Peggy was an undercover agent (R. 1009) but asserted that because "no attempt was made to force [Respondent] to talk" (R. 1011), any "statements which [Respondent] made" (R. 1012) could be introduced into evidence. Defense counsel asserted, in response, that under the cases he had cited it was "one of our rights as an attorney to demand to be

present . . . and this woman did not advise my client that she was a law enforcement agent. It was by trickery and device that she tried to obtain statements from my client." (R. 1012) The court, responding to Mr. Foley's non-federal objection, suggested that the state withdraw Peggy until the following day. In response to the *Dorado-Messiah* objection the court ruled, however, that "we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time." (R. 1013) Respondent's attorney, Mr. Foley, disputed the judge's requirement that he must object in the presence of the jury after the preliminary questions, asserting: "You know that isn't right, your Honor." The judge then concluded the hearing by saying: "I don't see how it could be done in the absence of the jury." When Peggy was called to the stand the following day (R. 1026), defense counsel did not renew his objections to the admission of Peggy's testimony in the presence of the jury, and he cross-examined her.

Argument

I. Respondent Did Not Deliberately By-pass State Procedures by His Institution of Federal Habeas Corpus Proceedings, Where the State Court Had Actually Passed on the Merits of His Claim.

Where a state court actually passes on the merits of a claim, the deliberate by-pass rule does not apply. *Warden, Md. Penit.* v. *Hayden*, 1967, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782.

Had the California District Court of Appeal refused to consider the merits of Respondent's claim with regard to the Fink testimony the deliberate by-pass rule would be applicable. It did however consider said contention on its

merits but rejected it. In its discussion of the merits of said claim that court stated that it "would have no hesitancy in ordering a reversal," except for its conclusion that Respondent had not been prejudiced by Fish's testimony. *People v. Miller*, *supra* at 738. Under these circumstances the deliberate by-pass rule is not available. *Warden v. Hayden*, *supra*.

II. THIS HONORABLE COURT, IN DENYING, PER CURIAM, RESPONDENT'S WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED, DID NOT ADJUDICATE THE MERITS OF HIS CONSTITUTIONAL CLAIM SO AS TO BAR HIM FROM SUBSEQUENT FEDERAL HABEAS CORPUS RELIEF.

28 U.S.C. §2244(c) provides that "a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner . . . shall be conclusive . . . as to all issues of fact or law . . . *actually adjudicated* by the Supreme Court" (Respondent's emphasis) when those issues are raised in a subsequent federal habeas corpus proceeding.

As the court below pointed out the Congressional intent in enacting §2244(c) was to give a conclusive presumption *only to actual adjudications* of the federal rights by the Supreme Court and not to give such a presumption to mere denials of writs of certiorari. S. Rep. No. 1797, 1966 U.S. Code Cong. & Adm. News, 3664.

This Honorable Court did not render a majority opinion in any way adjudicating Respondent's claim. Certainly such an adjudication was available to it after entertaining oral argument and its refusal to engage in meritorious comment was a deliberate decision attended by specific judicial consequence. This Honorable Court's dismissal of the writ as having been improvidently granted is indistinguishable from a denial of the original petition. Indeed,

the dissenting opinion of this Honorable Court opens with speculation as to which of three potential grounds served as the predicate for the majority's election not to consider the merits. Similarly, the petition is purely speculative as to the interpretation of this Court's dismissal of Respondent's writ as improvidently granted. This Honorable Court did not render an opinion as to the merits of Respondent's writ and therefore there was effectuated no stare decisis upon which to base a claim of res adjudicata.

III. Respondent Did Not Waive His Federal Constitutional Claims by Failing to Renew His Objection to the Fisk Testimony in the Presence of the Jury When His Trial Counsel Did So Specifically Object Before the Court and Did Specifically Object to the Court's Ruling that Said Objection Must Be Renewed Before the Jury.

Petitioner contends that Respondent's defense counsel would have had to make his objection in the presence of the jury after Peggy Fisk had stated that she had been Respondent's cellmate, that Respondent had made statements to her, and that she had never advised Respondent of her constitutional rights. A sustained objection at that point could not fail to leave the jury with the erroneous impression that Respondent had confessed to the crime. No legitimate state interest is served by requiring, in the context of a case like this, that an objection be renewed in the presence of the jury after preliminary questioning. See *Jackson* v. *Denno*, 378 U.S. 368, 378-88 (1964).

In light of the unconstitutional choice to which Respondent's counsel was put, it cannot be argued that his decision not to object in the presence of the jury was a "strategic, tactical" or other decision "that can fairly be described as the deliberate by-passing of state procedures."

Fay v. *Noia*, 372 U.S. 391, 439 (1963). There is nothing in the record to support the view that he preferred to have Peggy Fisk's testimony admitted rather than excluded. Compare *Henry* v. *Mississippi*, 379 U.S. 443 (1965) at p. 451. Indeed, if this were the case it would be extremely difficult to explain why he voiced his objection before her testimony. The most that can be said is that he may have preferred to have Peggy's testimony admitted rather than object in the presence of the jury after the preliminary questions. Indeed this is precisely how Respondent's trial counsel explained, in his motion for a new trial, why he had not renewed his objection. See F. vol. II, 266.

Petitioner claims that:

> "Under California law counsel for Respondent could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by Respondent to the undercover agent were voluntary and were not obtained in violation of Respondent's right to counsel and against self-incrimination." (Petition, p. 43).

But this is precisely what defense counsel attempted to do at the on-the-record proceeding in chambers. He objected to Peggy's testimony, but the trial judge ruled that "we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time." (R. 1015) Respondent"s attorney disputed the judge's requirement that he must object in the presence of the jury, asserting: "You know that isn't right, Your Honor." But the Judge finally ruled that: "I don't see how it could be done *in the absence of the jury*." (R. 1015, emphasis added) In light of this exchange, how can it be said that counsel for Respondent "made no

such request" for a determination outside the hearing of the jury? What more could counsel do other than argue with the judge's ruling or futilely repeat his request?

The instant case does not reflect a situation wherein defense counsel deliberately, as a matter of trial strategy, waived his constitutional objections to certain evidence, as in *Curry* v. *Wilson*, 405 F. 2d 110 (Ninth Cir. 1968). Respondent's trial counsel considered the Fisk testimony completely prejudicial and attempted to have it excluded by objecting thereto in chambers. His refusal to renew his objection in the presence of the jury, as the trial court insisted, was based upon his conviction that this might lead the jury to speculate that the excluding testimony was more incriminatory than it actually was. As the court below pointed out this insistence by the trial court was unreasonable and unconstitutional. It is the overriding duty of a federal court to protect federally guaranteed rights of an individual citizen, which duty impels the court to inquire into the reasonableness and constitutionality of state procedural rules. *Whitevs* v. *Blalrom*, 333 F. 2d 496 (Fifth Cir. 1964).

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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APPENDIX A

392 U.S. 616

LOVEDAY MIMMS, petitioner, v.
STATE OF CALIFORNIA.
No. 154, OCTOBER TERM, 1967.

On Writ of Certiorari to the District Court of Appeal of California, Fourth Appellate District.

Former decision, 389 U.S. 968, 88 S.Ct. 460; 389 U.S. 1028, 88 S.Ct. 761.

F. Lee Bailey, Boston, Mass., for petitioner.

Philip C. Griffin, Los Angeles, Cal., for respondent.

Facts and opinion, 245 Cal.App.2d 112, 53 Cal.Rptr. 720.

June 17, 1968. PER CURIAM. The writ of certiorari is dismissed as improvidently granted.

Mr. Justice MARSHALL, with whom THE CHIEF JUSTICE, Mr. Justice DOUGLAS, and Mr. Justice BRENNAN join, dissenting.

The Court may leave this judgment standing only upon one or more of the following grounds: that there was no constitutional error in petitioner's trial; that whether or not there was error, objection to it was waived; or that the error was harmless. None of those grounds are persuasive to me, and I would reverse.

The facts of the case are as follows. A short time after midnight on October 8, 1964, petitioner's husband was killed in the conflagration of the automobile in which he and petitioner had been riding. Later that day, at about 1:30 p. m., petitioner was arrested for murder, and was taken to a county jail, where she was booked on that charge and placed in a cell. She was met at the jail by a lawyer, a family friend who had been called by petitioner shortly after the fire. The night of her arrest petitioner spoke with a police officer for several hours at the jail, answer-

ing questions and reciting her version of what she claimed to have been an accidental fire.

In an attempt to prevent questioning of his client, petitioner's counsel set up, with his associates, a 24-hour-a-day watch of her cell. Thereafter, at about 11 p. m. on October 9, Peggy Fisk, an undercover agent in the employ of the county sheriff's office, was falsely booked into the jail on a fictitious narcotics charge and placed in petitioner's cell. Two other prisoners who had shared the cell were later removed. Fisk did not advise petitioner that she was an agent of the sheriff placed in the cell to report on anything petitioner might say. She remained alone with petitioner until October 15, giving oral reports as to their conversations from time to time to the sheriff's office; a written report was prepared on October 12 and partly on October 14.

On October 12, a complaint was filed formally charging petitioner with murder; petitioner was arraigned that day on the complaint.[1] An indictment was returned on October 20, and the complaint was then dismissed.

It was the State's theory at trial that petitioner did not love her husband; that she drugged him and then set the automobile on fire; and that she killed him in order to be free to marry one Arthwell Hayton and to collect some $100,000 in insurance proceeds. The defense theory was that the fire was of accidental, rather than incendiary, origin. The defense contended that although petitioner was in love with Hayton until her husband's death the affair between them had terminated several months earlier, petitioner had given up any thought of marrying Hayton, and had been reconciled with her husband; and that she would

[1] The judge on the same day issued an order prohibiting officials from questioning petitioner unless her attorney was present, and ordered her attorneys to cease sitting outside her cell. Apparently, the police did not inform the judge of Fisk's continued presence.

not be motivated to kill her husband for the insurance since he earned some $60,000 a year in his dental practice.

Fisk was called as a prosecution witness at trial and testified that petitioner told her in the cell after her arrest for murder that "she did not love her husband but she respected him"; that "she had always loved Mr. Hayton and still loves him"; that "she would receive over a hundred thousand dollars in insurance because of the accidental death"; and that "as soon as this mess was over, that she planned to take [her children] * * * away to Europe with the insurance money."

The district attorney relied upon and emphasized Fisk's testimony in his argument to the jury. See infra, at 2268-2269. After deliberating for more than three days, the jury returned a verdict that petitioner was guilty of murder in the first degree. She was later sentenced to life imprisonment.

I.

Although the issue is not free from difficulty, it seems to me the record clearly reveals petitioner adequately raised and preserved her federal constitutional objection to Fisk's testimony. That issue arises in the following context.

Toward the close of its case in chief, the prosecution called Fisk as a witness. Petitioner's trial counsel immediately objected, before Fisk was sworn, to her testimony at that time, on the ground that he had not been given her address prior to her testifying as he had been promised. There then occurred an extended conference in the judge's chambers.

In chambers, petitioner's counsel made two objections to Fisk's testimony. He first discussed the objection raised in the presence of the jury that he had not been given the witness' address as he had been promised, so that he might interview her. He then presented extensively the constitu-

tional objection to any testimony at all from Fisk, discussing the circumstances giving rise to the contention and citing the relevant cases.[2] The district attorney first explained why he had been unable to provide counsel with Fisk's address and acknowledged that he had forgotten the request, which was apparently based on the fact that defense counsel had been shown, a month or so earlier, a report of the sheriff concerning the witness in which she had been identified as "Jackie Doe." He attempted to distinguish the cases cited by petitioner's counsel, and elaborated somewhat on Fisk's activities.[3]

As to the first ground of objection, the trial judge said "in view of the circumstances related that Mr. Foley [defense counsel] was promised an opportunity to talk to this witness," Fisk should be withdrawn at that time. The district attorney agreed to withdraw her. The trial judge then turned to the constitutional ground of objection. It had been clearly disclosed at the conference that Fisk spent almost a week in petitioner's cell, without disclosing her identity, and would testify concerning statements made to her by petitioner. The district attorney said he would call her as a witness the next day and stated to the judge, as to petitioner's constitutional objection: "You would have to wait and listed to the voir dire on the stand and see." The following colloquy, concluding the in-chambers conference, ensued:

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[2] Counsel cited by name and discussed, as did the district attorney, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1965). The latter decision, grounded on the Federal Constitution, encompasses a claim based on Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

[3] The district attorney represented that Fisk, although being with petitioner "for about a week," did not interrogate petitioner or in any way seek to elicit information from her. Although that representation was undoubtedly made in good faith at the time, it is conceded to be incorrect. See infra, at 2266.

"The Court; * * * [Y]ou will have the opportunity to talk to her but on the other objection, we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time.

"Mr. Foley: You know that isn't right, your Honor.

"The Court: Unless you want me to look at this [sheriff's] report and see what she knows. Does this report indicate?

"Mr. Turner [district attorney]: There has to be a foundation laid, an objection made. There is no way to—

"The Court: I think there would have to be. I don't see how that could be done *in the absence of the jury*." (Emphasis added.)

The following day Fisk was called as a witness. The district attorney asked some preliminary questions. Fisk was identified as having been employed the previous October by the county sheriff as an undercover agent, and it was elicited that in the course of that employment she was assigned the task of pretending to be a prisoner in jail with petitioner, where she became acquainted and talked with her. When the district attorney asked Fisk if petitioner had discussed her "domestic problems with her husband," counsel for petitioner asked if he might "ask a question on voir dire." He elicited that Fisk had not identified herself as a police agent to petitioner, and had not advised petitioner she could have an attorney present when they talked. Direct examination was then resumed by the district attorney. Fisk then testified concerning petitioner's statements to her, see *supra*, at 2260.

On cross-examination, petitioner's counsel elicited answers concerning Fisk's being placed in petitioner's cell, reporting to the sheriff, and activities in the cell (see *infra*, at 2266). He also elicited that petitioner had told Fisk

the fire was accidental, and, in short, a story concerning her husband's death consistent with that which petitioner had related to the police at the scene and in questioning at the jail, and consistent with petitioner's claim of innocence.

In these circumstances respondent contends that it is "obvious" that petitioner's trial counsel, following his interview with Fisk, made a tactical judgment that her testimony would be helpful, and therefore that the federal claim is not available to petitioner here because it was waived. I find that view unacceptable.

The District Court of Appeal clearly agreed that petitioner's federal contention based on our decisions in *Massiah* and *Escobedo* was valid. 245 Cal.App.2d 112, 144, 53 Cal.Rptr. 720, 740. The court stated it did not reverse the conviction only because it viewed Fisk's testimony as nonprejudicial. Ibid. However, it went on to say that petitioner waived the point by failing to object when Fisk was called the day following the in-chambers conference, or, to put it another way, that "it is reasonable to assume that defense counsel was willing to have Peggy [Fisk] testify" in the circumstances. 245 Cal.App.2d, at 143, 53 Cal.Rptr., at 740.[4] I think it significant to note that the Supreme Court of California specifically disapproved the language of the District Court of Appeal in this case with respect to waiver of objections to admission of evidence obtained in violation of *"Escobedo-Dorado"* by a mere failure to object, see People v. Doherty, 67 Cal.2d 9, 14, 59 Cal.Rptr. 857, 860, 429 P.2d 177, 180 (1967), and in the same decision

[4] One factor recited by the court as leading it to conclude that petitioner's counsel desired Peggy Fisk's testimony was that he "received a copy of Peggy's reports to her superiors concerning her talks with defendant," and, apparently, was in a position to balance its advantages and disadvantages. 245 Cal.App.2d, at 143, 53 Cal.Rptr., at 740. The record does not reveal that sheriff's report, but it does show that counsel had seen it prior to objecting strenuously at the in-chambers conference to Fisk's testifying.

cast considerable doubt on the approach of the District Court of Appeal in this case toward presuming or assuming that the failure to object was a considered trial stratagem.[5]

In any event, this Court has long held that a waiver of a federal constitutional right is not lightly to be presumed. See, e. g., Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In this case counsel clearly apprised the trial court of the basis of his objection, and indeed he cited the specific decisions that clearly supported the claim. Surely there was no bypassing of the state courts on the issue.

Concerning the failure to renew the objection, I note that the trial judge appears clearly to have required petitioner to raise the issue anew in front of the jury and after preliminary questions had been asked of Fisk. On this record those preliminary questions clearly identified her as having engaged in conversations with petitioner as an undercover agent in the jail pretending to be a fellow prisoner. As petitioner's trial counsel said in a motion for a new trial: "The defendant was then placed in the unfortunate position of being forced to object in front of the jury. If the objection were sustained, the jury might well * * * infer that through a technicality the defendant had managed to keep out of evidence a full confession."

Thus the most that can be said on this record is that trial counsel—having previously raised the objection—preferred to have Fisk's testimony admitted rather than objecting to it in the presence of the jury after Fisk had

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[5] In the *Doherty* case, the California Supreme Court said, in a situation where counsel might develop facts upon which an objection could be based but did not object (in relation to that court's *Dorado* decision), not that it would assume waiver of the point, but rather that "[i]f the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection." 67 Cal.2d, at 14, n. 4, 59 Cal.Rptr., at 660, 429 P.2d, at 180, n. 4.

been identified. Cf. Jackson v. Denno, 78 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); People v. Schader, 62 Cal.2d 716, 727-728, 44 Cal.Rptr. 198, 200, 401 P.2d 665, 672 (1965). Placing a defendant in that kind of a dilemma with respect to renewing a federal constitutional objection serves no valid purpose. Douglas v. State of Alabama, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). And while respondent indicates here that California law permits a defendant to object to the admission of evidence and establish a basis for the objection outside the presence of the jury (citing *Schader*, supra), that was neither the import of the trial judge's ruling in this case nor the view of the district attorney at this trial (see supra, at 2261-2262).

Since the record reveals the trial court and the prosecution were clearly apprised of the constitutional claim, since the state court at least alternatively passed upon the validity of that claim, and since it cannot be said on the record that the failure to renew the objection was anything more than a decision reflecting the trial judge's ruling that the objection be voiced before the jury, I should think it perfectly clear that the issue was adequately preserved.[6]

II.

Notwithstanding that respondent's own courts viewed Fisk's placement and activities in petitioner's cell as unconstitutional, respondent here attempts to defend the sheriff's action on two grounds, both of which are patently without substance.

Respondent contends that petitioner's constitutional rights were not violated, because Fisk was placed in the cell prior to any formal charge being filed against peti-

[6] Cf. Fay v. Noia, 372 U.S. 391, 438-440, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Compare Henry v. State of Mississippi, 379, U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

tioner. To be sure, it is emphasized in Massiah v. United States, 377 U.S. 201, 204-206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), that the defendant there had been indicted and that an indictment marks a point at which the formal adversary process begins. Thus, the Court held that statements obtained on behalf of the prosecution by a co-conspirator of the defendant during conversations in the former's automobile, violated the defendant's Sixth Amendment right to counsel[7] since he had been indicted and was already represented by counsel. At the same Term, the failure to honor the right to counsel was recognized at an earlier stage in respect to interrogations, namely, when, among other things, "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. * * *" Escobedo v. State of Illinois, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). That language applies here. Petitioner had been arrested and booked for murder. Clearly, given the circumstances of the fire, if a crime had been committed, petitioner had done it. In practical effect the criminal proceedings had begun, for it is clear from the arrest, from petitioner's initial questioning, and from the decision to use Fisk that the sheriff's office had ceased merely a general inquiry into the cause of the fire.[8]

Indeed, in one respect at least, this is a clearer case than *Massiah*: unlike the defendant there, who had been released on bail, petitioner was in custody without bail, with a consequent lack of freedom to choose her companions. And petitioner, like the defendants in *Massiah* and *Escobedo*, was represented by counsel at all times. Moreover, a formal

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[7] At the same Term, Massiah was applied to vacate a state judgment affirming a conviction. McLeod v. Ohio, 378 U.S. 592, 84 S.Ct. 1922, 12 L.Ed.2d 1037 (1964). See also McLeod v. Ohio, 381 U.S. 356, 85 S.Ct. 1556, 14 L.Ed.2d 682 (1965).

[8] Cf. Hoffa v. United States, 385 U.S. 293, 309-310, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

complaint charging petitioner with murder was filed on October 13, and Fisk remained in petitioner's cell, eliciting information or conversing with petitioner until October 15.[9]

Both state courts, see, e. g., People v. Flores, 236 Cal.App.2d 807, 46 Cal.Rptr. 412 (1965), cert. denied, 384 U.S. 1010, 86 S.Ct. 1917, 16 L.Ed.2d 1017 (1966) (jail cell plant); People v. Ludlum, 236 Cal.App.2d 813, 46 Cal.Rptr. 375 (1965), and lower federal courts, see e. g., Clifton v. United States, 341 F.2d 669 (C.A. 5th Cir. 1965), have held that the right to counsel as interpreted in *Massiah* and *Escobedo* bars the admission of statements obtained at some preindictment point, at least when the accusatory stage has been reached and the police have clearly focused upon the subject.[10] However that stage be defined, it was clearly reached here.

Respondent also contends that petitioner's constitutional rights were not violated, because Fisk engaged in no "process of interrogations," Escobedo v. State of Illinois, 378 U.S. at 491, 84 S.Ct. 1758 designed to obtain a confession from petitioner, or that statements from her had not been "deliberately elicited," Massiah v. United States, 377 U.S., at 206, 84 S.Ct. 1199. In the State's view, so long as Fisk acted simply as a listening post, she could testify as to any statements made to her by petitioner. That view was, however, rejected in *Massiah* itself. The Government in that case pointed to the fact that the record did not reveal that its agent had induced the defendant by persuasion (there based on friendship) to discuss his activities, and urged that "'providing a defendant an opportunity to talk'"[11] did not violate his right to counsel. See also Beatty v. United

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[9] See n. 12, infra.

[10] Cf. People v. Robinson, 16 A.D.2d 184, 224 N.Y.S.2d 705 (4th Dept. 1962) (jail cell plant). See also Note, 79 Harv.L.Rev. 935, 1006 (1966).

[11] Brief for the United States, Massiah v. United States, No. 199, October Term, 1963, at 30.

States, 389 U.S. 45, 88 S.Ct. 234, 19 L.Ed.2d 48 (1967), reversing 377 F.2d 181 (C.A. 5th Cir.).

At all events, Fisk was not put in the cell to discuss the weather, to console petitioner, or merely to provide her with companionship. Her presence itself was an inducement to speak, and an inducement by a police agent. While petitioner's statements to her were not obtained by coercive means, they certainly were not given, in light of the deception, through a knowing and intelligent waiver of petitioner's rights.

Furthermore, it is clear on this record that Fisk was planted in petitioner's cell in order to subvert her right to counsel, with the express purpose of attempting to obtain evidence out of her mouth. On one occasion, Fisk was given a newspaper clipping concerning the case and was told to show it to petitioner, which she did with some accompanying statement, such as the press is "ruining you." On another occasion, pursuant to instructions, Fisk told petitioner of a conversation that she had supposedly overheard in a hall between four men whom she thought were from the district attorney's office, in which one of the men, as the ruse went, said: "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case." Fisk also told petitioner "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Finally, Fisk said that she had at one time been represented by an attorney who "did not do me much good" and indicated that perhaps petitioner should suspect hers.[12]

[12] Respondent also argues that petitioner did not show that any of her statements as related by Fisk occurred prior to the filing of a formal charge on October 13, or were specifically prompted by the four incidents of deliberate inducements to speak related in the text above. Of course petitioner has no such burden in the circumstances of this case. Besides, petitioner's counsel asked Fisk, for example, "which day was it that she [petitioner] mentioned insurance money to you, 9th, 10th, 11th, 12th, 13th or 14th?"

Such deliberate police deception and subversion of a defendant's rights should not be condoned. The District Court of Appeal said in this case:

> "It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred. • • •
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> "The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible. • • • •" (245 Cal.App.2d, at 141, 143-144, 53 Cal.Rptr., at 738, 740.[13])

I agree, and I would not leave standing a judgment reflecting such an egregious violation of *Massiah* and *Escobedo*.[14]

III.

Having concluded that petitioner properly preserved her federal constitutional objection to the admission of Fisk's testimony, and that its admission did indeed violate her constitutional rights, I turn to respondent's contention that the error was "harmless beyond a reasonable doubt," Chapman v. State of California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Chapman* was decided after the decision of the California District Court of Appeal now

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Fisk was unable to answer. Moreover, assuming all the statements were made on the first day of Fisk's deceptive presence in the cell, I would reach the same result.

[13] In addition to the other cited cases (see supra, at 2265) in which the admission of testimony by jail cell undercover agents was held to be unconstitutional, see People v. Arguello, 63 Cal.2d 566, 47 Cal.Rptr. 485, 407 P.2d 661 (1965).

[14] Petitioner's trial, which began on January 11, 1965, was prior to the effective date of Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and therefore that decision is not applicable. See Johnson v. State of New Jersey, 384 U.S. 719, 734, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

on review here, and normally a remand would be in order so that the state court might reconsider, in light of that case, its conclusion that the error was harmless. However, since a majority of the Court refuses to decide this case at all, I wish to point out why I cannot regard the error as harmless.

I have already indicated generally the theories of the prosecution and defense as to Dr. Miller's death (see supra, at 2259-2260). The evidence against petitioner was circumstantial.[18] So saying, I do not imply it was necessarily in any sense weak; that fact does, however, help to indicate why the issue of motive was particularly crucial, and one which was central to the trial. Fisk's testimony definitely supported the State's case on that issue. Petitioner testified that she loved Hayton until " the minute that Cork [Dr. Miller] was gone," but that she had given up any idea of marrying Hayton as of the time of an incident that occurred approximately three months prior to her husband's death. As to that testimony, the district attorney argued to the jury:

> "But that's not what she told the girl [Fisk] up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her."

On rebuttal argument, the district attorney again emphasized Fisk's testimony:

> "He [defense counsel] says the prosecution's case is based entirely on surmise and conjecture. That's not true.
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> . . . . . .
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> "Is it surmise and conjecture that Mrs. Miller had been infatuated with Hayton and wanted to marry him?
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> "There is disagreement as to when this wanting to

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[18] See Fontaine v. State of California, 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154; cf. Anderson v. Nelson, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81.

> marry him stopped, but there is no question at all that she wanted to marry him.
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> • • • • • •
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> "Is it surmise and conjecture that she told the girl up in jail she still loved Hayton and did not love her husband?
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> • • • • • •
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> "And, of course, right after her husband's death she is arrested and is in custody, and she tells the girl upstairs that she still loves Hayton."

To be sure, for almost each point upon which Fisk's testimony was emphasized there was other supporting evidence. But this Court has always viewed evidence out of a defendant's own mouth obtained after the events, as particularly weighty with the jury. See Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). And, as the quotations above indicate, that was plainly the view of the district attorney in this case. Certainly Fisk's testimony, if believed, made the prosecution's case much more credible, and undermined petitioner's defense.

Moreover, the jury deliberated three days before reaching a verdict. It may have spent that time assessing the expert testimony in regard to the causes of fires in automobiles, weighing the prosecution's experts' testimony that this fire was of incendiary origin against the testimony of an expert for the defense, who said the fire might well have been accidental. It may have found all that time necessary to resolve the question of guilt or innocence. Or, since it was charged on both first- and second-degree murder, it might have spent that time weighing not guilt and innocence but degree of guilt, even though only the former would have been consistent with the prosecution's theory. Fisk's Testimony may have been particularly important with respect to the jury's resolution of that matter.

While of course one cannot know definitely what occupied the jury's time during the three days it deliberated, I am convinced it cannot be said "beyond a reasonable doubt," Chapman v. State of California, supra, that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). I would therefore reverse petitioner's conviction.